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IN THE

Supreme Court of the United States

October Term, 1956

No. ~~1025.~~ 135

FLOYD E. KIDD,

Petitioner,

v.

MERCK & COMPANY, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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v.

MERCK & COMPANY, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court (not printed by petitioner) is unreported but may be found in the Record, p. 166a. The opinion of the Court of Appeals and the dissenting opinion (App. B of Petition) are reported at 242 F. (2d) 592.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED.

1. Is the virus of serum hepatitis a "filthy" substance within the intendment of Section 52-115(a)(1) of the Tennessee Food, Drug and Cosmetice Act, which defines a drug as adulterated "If it consists in whole or in part of any filthy . . . substance"?

2. Where a physician, knowing that human blood plasma may contain the virus of serum hepatitis, administers such plasma to a patient in the course of his medical or surgical treatment:

(a) Does the patient's consent to treatment by the physician, even if the patient is not specifically advised of the risk of serum hepatitis, serve as a voluntary assumption of such risk which constitutes a defense to an action based on negligence presumed in law?

(b) Is the physician's failure specifically to advise the patient of the risk involved an independent, intervening act which destroys the causal connection between the assumed statutory negligence of the manufacturer of the plasma and the injury sustained by the patient?

STATUTE INVOLVED.

The only statute involved is the Tennessee Food, Drug and Cosmetic Act, and particularly Section 52-115(a)(1) thereof, printed in Appendix A to the Petition, p. 12.

The Federal Food, Drug and Cosmetic Act is *not* involved in this litigation.

STATEMENT.

This litigation involves an action by Floyd E. Kidd, the petitioner, against Merck & Company, Inc., the respondent, for damages for hepatitis contracted by Kidd following the administration to him by his physician of Normal Human Blood Plasma manufactured by the respondent. Federal jurisdiction is based on diversity of citizenship.

It is known that the blood of certain individuals contains the virus of a liver disease known as serum hepatitis and that the transfusion of such blood may produce serum hepatitis in the recipient (R., 132a; Exhibits Nos. 1 & 2, 57a, 58a, 169a, 170a). The presence of this virus in blood or blood plasma, as petitioner conceded, cannot be discovered by any method or test known to medical science (R., 76a, 77a, 104a), and the virus cannot be destroyed by any known method which does not also destroy the utility of the blood or plasma (R., 102a, 115a, 123a, 132a).

Since blood plasma is manufactured by a process which involves pooling the blood from a substantial number of donors, the blood from any one of whom may contain the virus of serum hepatitis, the use of pooled plasma involves a calculated risk that the patient to whom the product is administered will develop serum hepatitis. This risk is well known to the medical profession (R., 56a, 82a, 91a, 103a, 115a), was known to the physician who administered plasma to petitioner (R., 56a), and was specifically pointed out by respondent in a descriptive pamphlet accompanying the package of plasma that was administered to petitioner (R., Exhibits Nos. 1 & 2, 57a, 58a, 169a, 170a).

In view of these facts petitioner amended his original complaint (R., 2a-7a) and withdrew charges of negligence, breach of warranty, and violation of the Federal Food, Drug and Cosmetic Act. The amended complaint on which the case was tried (R., 11a-14a) charged solely a violation of the Tennessee Food, Drug and Cosmetic Act.

Petitioner obtained a jury verdict in the District Court (R., 160a). Respondent's motion for judgment notwithstanding the verdict (R., 161a), on the grounds (a) that the plasma was not adulterated within the meaning of the Tennessee Act, (b) that the petitioner had assumed the known risk, and (c) that the act of petitioner's physician in administering the plasma, knowing of the risk, was an independent, intervening cause of petitioner's injury, was denied (R., 166a).

On appeal the Court of Appeals, construing the Tennessee statute in the absence of any adjudication of the pertinent provisions by the courts of Tennessee, found that respondent's act did not involve a violation of the statute, and accordingly reversed the District Court and directed that judgment be entered for the respondent. It found it unnecessary, in view of this disposition of the case, to consider the questions of assumption of risk and the effect of the independent, intervening act of a physician, raised by the respondent both in the District Court and in the Court of Appeals.

ARGUMENT.

The issue in the present case is extremely narrow,—the construction by a Court of Appeals, sitting for that purpose in a diversity case as a court of Tennessee, of a Tennessee statute; and no strained semantics can change it to one which should be reviewed by this Court on certiorari.

No conflict with the decision of another Court of Appeals on this issue is or could be involved; no conflict between the decision below and any decision of the state courts of Tennessee is alleged; no question of federal law is involved; there is no decision on a federal question in conflict with the applicable decisions of this Court; and, of course, there was no departure by the court below from the accepted and usual course of judicial proceedings.

The Question Presented Involves Only Tennessee Law.

Petitioner urges that because the Tennessee Food, Drug and Cosmetic Act is patterned upon the Federal Food, Drug and Cosmetic Act, and because identical or similar provisions appear in the acts of various other states, the construction of the Tennessee Act becomes a question of general significance which should be decided by this Court. The argument, if accepted, would require this Court to review on certiorari every decision of a state court, or of a Court of Appeals in a diversity case, where the court below had construed a provision of any one of the some fifty-seven uniform acts prepared by the National Conference of Commissioners on Uniform State Laws which have been adopted in a plurality of jurisdictions, or of any state act based upon a Federal statute or the statutes of sister states.

In all such cases the local decision may be of value as a precedent in other jurisdictions, and in that sense, and that sense alone, may be of more than local significance. Petitioner fails to distinguish between the effect of the de-

cision below as a statement of applicable *law*, controlling upon other courts, and such effect, if any, as it may have as a precedent in other jurisdictions.

Under *Erie v. Tompkins*, 304 U. S. 64; 82 L. Ed. 188; 58 S. Ct. 817, a Federal court in a diversity case sits in effect as a court of the state and applies state law. It is bound to give effect to state law as determined by the courts of the state, and only where, as here, the courts of the state have not spoken may a Federal court presume to interpret the state statute. Even where the Federal court has interpreted a state statute, such interpretation cannot prevail against a subsequent, contrary interpretation by the state court. *Huddleston v. Dwyer*, 322 U. S. 232, 236; *Vandenbark v. Owens-Illinois Co.*, 311 U. S. 538, 543.

Accordingly, the decision of the Court of Appeals in this case, construing the Tennessee statute, operates only to determine the law of Tennessee and that only in the absence of a contrary interpretation of the Tennessee statute by a Tennessee court. The decision of this Court, if certiorari were granted, would go no further and would not control as a matter of law the decision of even a Tennessee court of first instance before which the interpretation of this Tennessee statute was raised. *Federation of Labor v. McAdory*, 325 U. S. 450, 471; *Huddleston v. Dwyer*, supra; *Vandenbark v. Owens-Illinois Co.*, supra.

The fact that the Tennessee Food, Drug and Cosmetic Act is patterned upon the Federal Food, Drug and Cosmetic Act and that the Court of Appeals in the absence of applicable Tennessee decisions had recourse to decisions of the Federal courts construing the Federal statute as an aid in its interpretation of the Tennessee statute in no way alters the case. The Court of Appeals did not purport to adjudicate a claim arising under the Federal statute. Such a claim, while present in the petitioner's original complaint in the District Court (R., 7a), was withdrawn by the amended complaint, which charged only a violation of the Tennessee statute (R., 14a, 18a). While both parties, and

the Court of Appeals, resorted to Federal decisions construing the Federal statute as an aid to the interpretation of the Tennessee statute, this cannot obscure or alter the fact that it was the Tennessee statute and not the Federal statute which was interpreted. Such use of Federal decisions does not by some alchemy convert a question of state law into a Federal question cognizable by this Court.

The question presented by the petition for certiorari may most simply be tested by inquiring whether, if the decision below were a decision of the Supreme Court of Tennessee instead of the Court of Appeals for the Sixth Circuit, this Court would grant certiorari. Under *Erie v. Tompkins*, supra, the test is the same.

There Is No Conflict With Any Decision of This Court.

Since certiorari will be granted on this ground only where a Court of Appeals has decided a *federal* question in a way in conflict with applicable decisions of this Court, the absence of a federal question in this case would itself suffice to deny review. However, there is no conflict, as petitioner would seek to have the Court believe, between the decision of the Court of Appeals and any decisions of this Court on the question of scienter.

The petitioner (pp. 5-6 of his brief) seeks to read into the decision of the Court of Appeals a holding that a manufacturer may not be held liable for harm caused by his product if he had neither the knowledge of its harmfulness nor the means of knowledge, citing that portion of the opinion which points out that an invisible virus whose presence can only be known by its ultimate result, is not, ascribing to words their ordinary meaning, a "filthy" substance. But this is no holding that under a pure food and drug act a manufacturer may not be held liable because he neither had knowledge nor the means of knowledge of the harmfulness of his product. The court below did not hold that the respondent did not violate the Act

because the virus was undiscoverable. It held that the respondent did not violate the Act because an undiscoverable, invisible virus, however injurious it might be, was not a "filthy" substance within the ordinary meaning of this term. The best evidence that the court below did not proceed on any principle of scienter is its statement, "If the hepatitis virus were present in food the food would clearly be adulterated under the Tennessee statute", since the virus is "a deleterious substance" which may render food "injurious to health" (App. B of Petition, p. 18).

Accordingly, petitioner's reference (pp. 5-6 of his Brief) to *United States v. Dottereich*, 320 U. S. 277, 281, 88 L. Ed. 48, 51, 64 S. Ct. 134, and *Morissette v. United States*, 342 U. S. 246; 96 L. Ed. 288; 72 S. Ct. 240, is without significance.

The Decision Below Is Correct: (a) In Its Construction of the Tennessee Statute, and (b) On Independent Grounds.

(a) Section 52-115(a)(1) of the Tennessee Food, Drug and Cosmetic Act provides that a drug shall be deemed to be adulterated "If it consists in whole or in part of any filthy, putrid or decomposed substance". Petitioner at the commencement of the trial in the District Court specifically disclaimed any contention that the virus of serum hepatitis is a "decomposed" or a "putrid" substance within the intendment of the Act and limited his case to the contention that this virus was a "filthy" substance (R., 19a). As the Court of Appeals noted in its opinion the Federal courts have repeatedly held that the word "filthy" as used in a pure food and drug act is intended to be given its ordinary meaning. *United States v. Swift & Co.*, 53 F. Supp. 1018, 1020 (MD Ga., 1943); *United States v. 44 Cases, etc.*, 101 F. Supp. 658, 664 (ED Ill., 1951). It seems perfectly clear that the virus of serum hepatitis would not be described as "filthy" in the ordinary sense of the word. It is tasteless, odorless, invisible even under the most

powerful microscope and indeed so far unknown that it is incapable of description. The real purpose of the prohibition against food or drugs containing a filthy substance is set forth in *United States v. 133 Cases, etc.*, 22 F. Supp. 515, 516 (E. D. Pa., 1938) as follows:

> "There can be no doubt that this section of the Act [referring to the precursor of 21 U. S. C. A. 342(a)(3)] was designed to protect the aesthetic tastes and sensibilities of the public. . . ."

Indeed were it not for the injurious character of the virus of serum hepatitis, no one would possibly contend that the virus was a filthy substance, and petitioner's entire effort in the court below and in his brief here is to equate in some manner the phrase "injurious to health" with the word "filthy". But as the Court of Appeals noted in its opinion (App. B to Petitioner's Brief, p. 18) the Federal courts have been unanimous in holding that the term "filthy" is *not* synonymous with "injurious to health" or "unfit for food". *Salamonie Packing Co. v. United States*, 165 F. (2d) 205, (8 Cir., 1948), cert. den. 333 U. S. 863; *United States v. 1851 Cartons, etc.*, 146 F. (2d) 760 (10 Cir., 1945); *United States v. 449 Cases, etc.*, 212 F. (2d) 567 (2 Cir., 1954).

The fact that the virus of serum hepatitis may be injurious is thus clearly irrelevant to the question of whether it is filthy, and a disregard of this distinction would ignore the very substantial difference between the statutory definition in the Tennessee Act of an adulterated food and that of an adulterated drug. A food is adulterated (Section 52-110(a)(1); App. A to Petitioner's Brief, p. 11) "If it bears or contains any poisonous or deleterious substance which may render it injurious to health", as well as if it consists in whole or in part of a filthy substance; while in the case of a drug the former provision is omitted, clearly by deliberation. To equate "injurious to health"

with "filthy" in the case of a drug, as petitioner urges, is to equate two distinct concepts which the Tennessee Legislature said were *not* to be equated.

(b) The Court of Appeals in view of its disposition of the case on the construction of the Tennessee statute found it unnecesary to consider the questions of assumption of risk and the effect of the independent, intervening act of a physician raised by respondent both in the District Court and the Court of Appeals. These defenses constitute independent grounds for sustaining the judgment of the Court of Appeals, even if it were in error in its construction of the Tennessee statute and that error were reviewable by this Court.

Each package of blood plasma sold by the respondent, including that used in treating the petitioner, contains a warning that its use involves a calculated risk of the patient's contracting serum hepatitis (R., Exhibits 1 & 2, 57a, 58a, 169a, 170a), and petitioner's attending physician testified that he had read such warnings and that he knew "It is a so-called calculated risk" (R., 56a, 60a). When the petitioner entered the hospital his wife signed on his behalf a consent to any medical or surgical procedure his physician deemed necessary (R., Exhibit 3, 99a, 173a) and petitioner testified that his wife had authority to sign such statement and that he would have approved and did approve of her having signed it (R., 34a, 35a).

Petitioner thus authorized his physician to accept the calculated risk involved in administering plasma. Since the physician accepted this risk on petitioner's behalf and was fully conscious of the existence of the risk, there was an assumption of risk which bars the petitioner from recovering from the respondent for the very risk which he assumed. That this defense, assumption of risk, is available even where liability is predicated on an alleged violation of statute rather than on actual negligence is clear. *Prosser on Torts,* (1941 Ed. p. 392); *Restatement of Torts,*

§ 286, Comment j; *Dart v. Pure Oil Company*, 223 Minn. 526; 27 N. W. (2d) 555 (1947), *Annotation*, 171 A. L. R. 894, Supplemented 10 A. L. R. (2d) 853; *Mt. Olivet Cemetery Co. v. Thomas*, 28 Tenn. App. 264, 271; 189 S. W. (2d) 1, 4, (1944) and the cases there cited.

As shown above, petitioner through his physician assumed the calculated risk involved in being treated with blood plasma. However, if petitioner should contend that the physician was not authorized by him to accept such a risk, then he is nevertheless barred from recovering because the physician's unauthorized act would be an independent, intervening cause of petitioner's injuries.

The Tennessee courts follow the general rule with respect to independent, intervening agency or cause. See *Ford Motor Company v. Wagoner*, 183 Tenn. 392, 397; 192 S. W. (2d) 840; 164 A. L. R. 364 (1946). The Court said:

> "In Bevan on Negligence, a leading text book on this subject, recognized as a classic, the chapter dealing with 'Limits of Liability' (Volume I, Fourth ed. pp. 42, 44), and discussing legal obligation to successive vendees of a compounder of drugs, or manufacturer of articles for sale to the public, dangerous to health, or in their use otherwise, thus lays down a generally recognized limitation upon liability saying (p. 42): 'A person who *knowing the perilous character* of a compound (equally applicable, clearly, to other instrumentalities fraught with danger) which he has bought, yet hands on the compound to a third person, *destroys, by his own negligent act, the causal connection between the first person concerned and the ultimate injury sustained.*'". (Emphasis by the Court.)

Thus the decision of the physician is the crucial act involved. Either the physician made this decision in accordance with the consent and authority of the patient or the physician took an unauthorized risk which constituted

an independent, intervening cause. Accordingly, in either event, whether the physician assumed the risk for petitioner or took the risk without authority, petitioner is barred from recovery.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

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